STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
GENERAL COUNSEL

International Association of Firefighters, Local 429,	)	
Labor Organization	)	
and	)	Case Nos. S-DR-15-007 S-DR-15-008
City of Danville,	)	
Employer	)	

DECLARATORY RULING

On February 4, 2015, the City of Danville (Employer) filed a unilateral Petition for Declaratory Ruling in Case No. S-DR-15-007 pursuant to Section 1200.143 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240. On February 6, 2015, the International Association of Firefighters, Local 429, likewise filed a unilateral Petition for Declaratory Ruling in Case No. S-DR-15-008. The parties' petitions each request a ruling on proposals that address the same provisions of the parties' predecessor contract. The Employer seeks a determination as to whether the Union's proposals to maintain the status quo constitute permissive subjects of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012). The Union seeks a determination as to whether the Employer's proposals to change the status quo address mandatory subjects of bargaining. In the alternative, the Union seeks a determination as to whether certain of the Employer's proposals are permissive proposals on the grounds that they seek a waiver of the Union's statutory rights. The cases were consolidated and both parties filed briefs.

I. Background

The Union is the exclusive bargaining representative of a historical unit of all uniformed positions within the Danville Fire Department, including Probationary Firefighters, Firefighters, Fire Lieutenants, Captains and Assistant Chiefs, but excluding the Director of Public Safety and clerical personnel. The parties' most recent collective bargaining agreement expired on April 30, 2014. The Union filed a demand for interest arbitration on June 11, 2014. The Employer previously filed a unilateral Petition for Declaratory Ruling on July 24, 2014 in Case No. S-DR-15-003. In that case, I issued a ruling finding that the Union's proposals concerning suppression force strength, equipment levels, and station minimum requirements addressed permissive subjects of bargaining.

II. Relevant Statutory Provisions

The duty to bargain is defined in Section 7 of the Act which provides in relevant part:

> A public employer and the exclusive representative have the authority and duty to bargain collectively set forth in this Section.
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> For the purpose of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
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> The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing

clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

5 ILCS 315/7 (2012).

Section 4 of the Act provides:

> Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.
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> 5 ILCS 315/4 (2012).

III. Summary of the Parties' Proposals

The Employer proposes to amend the prior contract "globally" at points where the contract refers to Station #3 by adding the following language: "or if taken out of daily fire suppression operations, a station designated by the City." The provisions affected by this proposal include Section 6.8 Station Assignments; Section 7.1 Manning Requirements; Section 9.2 Vacation Scheduling; and Appendix F – Mabas Training Procedure, Compensation. The Union seeks to maintain the status quo with respect to these provisions.

The Employer proposes to remove Section 7.1(f) addressing manning requirements, which provides the following: "In those instances when manning of a shift falls below 15, personnel at Station 3 may be assigned to the appropriate responding apparatus per Fire Division guidelines and procedures, which shall be mutually agreed to by IAFF Local 429 and the City." The Union seeks to keep this provision.

The Employer also proposes to amend the prior contract "globally" by replacing reference to "Assistant Chief" with "Shift Commander." With respect to manning, the Employer

proposes to remove reference to "Assistant Chief" without replacement. The provisions affected by these proposals include Section 6.6 Scheduling Kelly Days; Section 6.7 Trading Time; Section 7.1 Manning Requirements; Section 9.2 Vacation Scheduling; Section 10.1 Sick Leave; Section 10.5 Compensatory Time-Off; Section 10.6 Jury and Witness Duties; Section 11.2 Working out of Classification; Section 12.1 Station Clothing; Section 17.1 Call Backs; Section 17.2 Emergency Call Back; Section 17.3 Fire Watch Call Back; Section 20.2 [Grievance] Procedure; Appendix C – Clothing and Insignia; and Appendix G, Probationary Firefighter – Field Training Program (FTP). The Union proposes to maintain the status quo with respect to these provisions.

Finally, the Employer proposes to remove those provisions of the prior contract that were found to address permissive subjects of bargaining in Case No. S-DR-15-003. The Union has not modified its proposals to remove those provisions and instead seeks to maintain the status quo.

IV. Issues

The Employer asserts that the Union's proposals to maintain the status quo are permissive subjects of bargaining because they place limitations on the Employer's managerial authority to unilaterally implement a legitimate reorganization. As part of the reorganization, the Employer contemplates closing a station and changing its organizational structure by modifying or removing the Assistant Chief position. The Employer asserts that the Union's proposals mandate the continued operation of Station #3 by preserving reference to it. Likewise, it claims that the Union's proposals mandate continuation of the existing organizational structure by preserving reference to the Assistant Chief position. The Employer also notes that the

Union's proposals improperly maintain provisions that were already identified as permissive subjects of bargaining in a prior declaratory ruling addressing these same negotiations, Case No. S-DR-15-003.

The Union counters that its continued reference to Station #3 and the Assistant Chief position is not key to determining whether its proposals address mandatory subjects of bargaining because the analysis rests on the proposal's broader subject matter rather than on its wording. Here, the Union claims that its proposals address topics that are well-established mandatory subjects of bargaining such as manning, station assignments, vacations, compensatory time, compensation for travel time, Kelly Days, time and duty trades, jury and witness duty, working out of classification, clothing, call backs, and the grievance procedure.

In the same vein, the Union contends that the Employer's proposals address these same well-established mandatory subjects of bargaining, and it applies the Central City test to that end.[1] In the alternative, the Union contends that certain of the Employer's proposals cannot be submitted to the interest arbitrator because they seek the Union's waiver of its statutory right to midterm bargaining over mandatory subjects and are therefore permissive proposals. The Union limits this argument to the Employer's proposal on station assignments, compensation for travel time, working out of classification, call backs, and the grievance procedure.

[1] The test for determining the mandatory nature of subjects of bargaining announced by the Illinois Supreme Court in Central City Educ. Ass'n, IEA/NEA. v. Ill. Educ. Labor Rel. Bd., 149 Ill. 2d 496 (1992), applies under the Illinois Public Labor Relations Act. City of Belvidere v. Ill. State Labor Rel. Bd., 181 Ill. 2d 191 (1998).

Finally, the Union argues that the Employer waived the right to claim that the Union's continued reference to the Assistant Chief position renders its proposals permissive because the Employer did not mention its planned reorganization until the first day of interest arbitration.[2]

V. Discussion and Analysis

a. Union's Proposals to Maintain the Status Quo Maintaining Reference to "Assistant Chief" and "Station #3"

The Union's proposals to maintain the status quo are mandatory subjects of bargaining, except to the extent that they include provisions I have already found to address permissive subjects of bargaining in Case No. S-DR-15-003.[3]

Here, the Employer effectively claims that the Union's proposals seek the Employer's waiver of its right to unilaterally implement a future legitimate reorganization because they limit reorganization by maintaining reference to Station #3 and the Assistant Chief position. For the reasons set forth below, the Union's proposals cannot be construed as seeking a waiver of the Employer's purported right to close Station #3 or to eliminate/modify the Assistant Chief position and they are therefore not permissive subjects of bargaining.

The parties agree that a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶ 125 (IL LRB-SP 2013); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001). An employer has a statutory right to decline bargaining over matters of inherent managerial policy, which include functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees,

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[2] Because I have ruled that the Union's contract proposals are mandatory subjects of bargaining, as discussed below, it is unnecessary to consider the Union's waiver argument. See Vill. of Arlington Heights, 13 PERI ¶ 2026 (IL LRB-SP GC 1997).

[3] The Employer is entitled to strike those permissive provisions from the arbitrator's consideration. See 80 Ill. Admin. Code 1230.90(k).

examination techniques, and direction of employees.[4] 5 ILCS 315/4. The waiver of that statutory right must be clear and unmistakable. Am. Fed'n of State, Cnty. & Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 269 (1st Dist. 1989).

For the sake of argument, I will assume that the Employer has a statutory right under Section 4 of the Act to decline bargaining over the identity of the stations it chooses to close and over its decision to remove/modify the Assistant Chief position.

Nevertheless, the Union's proposals referencing Station #3 and the Assistant Chief position do not include the clear and unmistakable language required to waive the Employer's right to decline bargaining over these matters. They do not expressly provide that the Employer must maintain Station #3 in operation; they simply suggest that Station #3 will remain in existence throughout the term of the contract by stating that employees will be assigned there. Similarly, they do not expressly state that the Employer must retain the Assistant Chief position as unmodified; they simply presuppose that the Assistant Chief position will remain in existence through the term of the contract by stating that the Assistant Chief will be assigned to each shift, and will be responsible for approving scheduling matters, approving requests for reimbursements, and acting as the first step in the grievance process. Am. Fed. of State Cnty. and Mun. Empl. v. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989) (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"); cf. Vill. of Midlothian, 29 PERI ¶ 125 (IL

[4] This right is not absolute. An employer is still required to bargain over subjects that touch on matters of inherent managerial authority when they affect employee's terms and conditions of employment and where the benefits of bargaining to the bargaining process outweigh the burdens that bargaining imposes on the employer's inherent managerial authority. Central City, 149 Ill. 2d at 523.

LRB-SP 2013); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001) (same); Vill. of Elk Grove Vill., 21 PERI ¶ 14 (IL LRB-SP 2005).

The Employer suggests that the arbitrator's incorporation of the Union's language would "significantly impede" the Employer's planned reorganization by injecting ambiguity into the agreement as to its authority to eliminate Station #3 and the Assistant Chief position. That purported ambiguity, far from mandating a finding of waiver, in fact precludes it. City of Aurora, 24 PERI ¶ 25 (IL LRB-SP 2008) (there can be no contractual waiver of a statutory right where the language of the contract is ambiguous). Accordingly, it is to the arbitrator that the Employer should present its concerns over future contract interpretation and its impact on the Employer's authority to unilaterally reorganize.

Thus, the Union's proposals to maintain the status quo by keeping reference to Station #3 and the Assistant Chief position do not seek the Employer's waiver of its statutory right to reorganize and they are therefore mandatory subjects of bargaining. However, the Employer is entitled to strike those portions of the Union's proposals that I previously found to address permissive subjects of bargaining in Case No. S-DR-15-003.

b. The Employer's Proposals

It is beyond my authority to make a determination as to whether the Act requires bargaining over proposals from the Employer that the Union has identified as addressing mandatory subjects of bargaining. My authority to issue Declaratory Rulings derives from Section 1200.143 of the Board's Rules and Regulations, which provides that parties may petition for a declaratory ruling concerning the status of the law where they "have a good faith disagreement over whether the Act requires bargaining over a particular subject or particular

subjects." 80 Ill. Admin Code 1200.143. Here, the parties have no such disagreement. The Union states, without qualification, that the Employer's proposals with respect to manning, vacations, compensatory time, Kelly Days, time and duty trades, jury and witness duty, and clothing address mandatory subjects of bargaining. The Employer has not disagreed, and a ruling on these matters is therefore inappropriate.

However, the parties do disagree as to the nature of the Employer's proposals concerning station assignments, working out of classification, compensation for travel time, call backs, and the grievance procedure. The Union claims they are permissive proposals because they seek the Union's waiver of its statutory right to midterm bargaining and the Employer implicitly disagrees.[5] For the reasons stated below, all these proposals address mandatory subjects of bargaining.

The right to midterm bargaining is not absolute. Mt. Vernon Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Rel. Bd., 278 Ill. App. 3d 814, 816 (4th Dist. 1996). It applies to those matters that are not the subject of a clause in the agreement or not fully bargained. Id. A union may waive the right to demand midterm bargaining, but the waiver of that right must be clear and unmistakable. Am. Fed'n of State, Cnty. & Mun. Empl., 190 Ill. App. 3d at 269; City of Wheaton, 31 PERI ¶ 131 (IL LRB-SP 2015). Accordingly, a union waives the right to midterm bargaining when it expressly waives bargaining over matters unforeseen or unknown by either party at the time of the contract's execution. Mt. Vernon Educ. Ass'n, IEA-NEA v, 278 Ill. App. 3d at 817. Applying these principles, proposals reserving an employer's unfettered discretion to change a fundamental aspect of employees' terms and conditions of employment seek a waiver of the union's right to midterm bargaining. City of Wheaton, 31 PERI ¶ 131 (IL

[5] The parties do not dispute that these subjects are mandatory when viewed broadly and without regard to the proposals' impact on the Union's statutory rights.

LRB-SP 2015) (addressing health care); City of Danville, 26 PERI ¶ 32 (IL LRB-SP GC 2010). However, not every contractual reservation of discretion to the employer seeks the waiver of that right. Vill. of Arlington Heights, 6 PERI ¶ 2052 (IL LRB-SP 1990) (addressing station assignments).

Here, the Employer's grievance proposal does not impact the Union's midterm right to bargain because it does not grant the Employer unfettered discretion to change the procedure midterm. It simply substitutes reference to "Assistant Chief" with "Shift Commander" and permits the Public Safety Director's designee to hear second step grievances. The time limits for grievance filing, the information that the Union is required to include in the grievance, and the position to which the Union must submit its first step grievances (shift commander) are fixed. The Employer's discretion to choose the identity of the shift commander does not relate to the procedure by which the grievance progresses and therefore does not bear on the characterization of the proposal as mandatory or permissive.

Likewise, the Employer's proposals with respect to call backs and working out of classification do not authorize the Employer to make unlimited and unforeseen midterm modifications to employees' terms and conditions of employment. They simply remove reference to the Assistant Chief position and, in some instances, replace reference to that position with "Shift Commander." Indeed, the proposal keeps employees' conditions of employment with respect to these subjects static, well-defined, and not on their face subject to any midterm change at all. Cf. City of Wheaton, 31 PERI ¶ 131 (employer's health care proposal was a permissive subject of bargaining where it granted employer unfettered discretion to make future changes to union members' health care benefits, which union could not anticipate at the time of bargaining).

Next, the Employer's station assignment proposal does not seek the Union's waiver of its midterm right to bargain over future changes to station assignments because the Employer's authority to make changes is limited and the scope of those changes is known to the Union. The Employer's discretion is confined to the following well-defined circumstances: (1) it may assign employees to any station, where the total number of personnel on duty is in excess of the minimum staffing[6]; (2) it may choose the station at which two firefighters may select the same station assignment[7]; and (3) it may choose the station from which it will take volunteers to fill vacancies at an outside house when manning is above the minimum.[8] Further, the Union is aware of the Employer's intention to close a station in the future and knows that the Employer's station assignments or selections will be limited to one of the three remaining in operation. Although the Union may argue before the arbitrator that the Employer should have no discretion in changing assignments, the Employer's proposal does not permit the broad, unforeseen changes indicative of a proposal that seeks a waiver of a union's midterm right to bargain. Vill. Of Arlington Heights, 6 PERI ¶ 2052 (noting that an employer is free to argue before the arbitrator that it should have unlimited discretion in making employee assignments); Cf. City of Wheaton, 31 PERI ¶ 131 (employer's proposal sought waiver of midterm right to bargain where it authorized employer to make any and all changes to employees' health benefits midterm).

Further, the Employer's proposal does not seek the Union's waiver of the right to bargain over future changes to employees' travel compensation because the discretion reserved

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[6] "All personnel on duty in excess of the minimum staffing for the bargaining unit shall be assigned to Station #3 (or, if taken out of daily fire suppression operations, a station designated by the City)."

[7] "No two firefighters may select the same station assignment, excluding Station #3 (or, if taken out of daily fire suppression operations, a station designated by the City) where two (2) of the three (3) most senior firefighters may select that station as their assignment."

[8] "When a vacancy exists at an outside house and manning is above minimum, such vacancies shall be filled on a voluntary basis starting with the most senior to the least senior firefighter on duty at Station #3 (or, if taken out of daily fire suppression operations, a station designated by the City)."

to the Employer is similarly limited and well-defined. Although the Employer may choose the station from which travel time is calculated if it closes Station #3, its choice is confined to one of only three stations. The Union can therefore determine whether the selection of one station over another would sharply decrease employees' travel compensation, and it can likewise determine the precise amount of that decrease. In turn, the Union can use these figures to make pointed arguments both against the grant of limited discretion and in favor of increased wages to compensate the well-defined potential decrease in travel compensation. Cf. City of Wheaton, 31 PERI ¶ 131 (employer's discretion to change health insurance benefits midterm was unfettered where it was based on unknown criteria over which the union had no control).

In sum, the Union's proposals to maintain the status quo are mandatory subjects of bargaining, except for those portions already identified as addressing permissive subjects in Case No. S-DR-14-003. Further, the Employer's proposals on station assignments, working out of classification, compensation for travel time, call backs, and the grievance procedure likewise address mandatory subjects of bargaining.

Issued in Chicago, Illinois, this 30th day of April, 2015.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD

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